

83 - 1338

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MAR 13 1984

ALEXANDER L. STEVAS

No. .

**In the
Supreme Court of the United States.**

OCTOBER TERM, 1983.

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

GEORGE UPTON,
RESPONDENT.

ON WRIT OF CERTIORARI FOR THE SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS.

Respondent's Brief in Opposition.

NANCY GERTNER,
SILVERGLATE, GERTNER, BAKER & FINE,
88 Broad Street,
Boston, Massachusetts 02110.
(617) 542-6663

TABLE OF CONTENTS

Table of Authorities	ii
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	3
REASONS FOR DENYING THE WRIT	6
I. THE SEARCH OF THIS CASE WAS CONDUCTED UNDER A WARRANT WHICH WAS CLEARLY INVALID UNDER <u>ILLINOIS V. GATES.</u>	6
II. THE DECISION OF THE COURT BELOW DOES NOT CONFLICT WITH THE DECISIONS OF OTHER STATE OR FEDERAL COURTS.	12
CONCLUSION	14

TABLE OF AUTHORITIESCases

Aguilar v. Texas, 378 U.S. 108 1963	2,6,7,8,12
Bonsness v. Wyoming, 672 P.2d 1291 (Wyo. 1983)	13
Commonwealth v. Upton, 390 Mass. 562 (1983)	2,3,9,13
Idaho v. Lang, 672 P.2d 561 (Idaho 1983)	13
Illinois v. Gates, 103 S.Ct. 2317 (1983)	Passim
Nathanson v. United States, 290 U.S. 41 (1933)	13
Spinelli v. United States, 393 U.S. 410 (1969)	2,6,7,8,10
United States v. Haimowitz, 712 F.2d 457 (11th Cir. 1983)	13
United States v. Herrera, 711 F.2d 1546 (1st Cir. 1983)	13
United States v. Johnson, 713 F.2d 654 (11th Cir. 1983)	13
United States v. Kolodziej, 712 F2d 975 (5th Cir. 1983)	13
United States v. Mendoza, 722 F.2d 96 (5th Cir. 1983)	13
United States v. Ross, 713 F.2d 389 (8th Cir. 1983)	13

IN THE
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No.

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

GEORGE UPTON,
Respondent

On Writ of Certiorari To The
Supreme Judicial Court For The
Commonwealth Of Massachusetts

RESPONDENT'S BRIEF IN OPPOSITION

QUESTIONS PRESENTED

Whether the Supreme Judicial Court of
Massachusetts, after applying the "totality of
the circumstances" approach outlined in
Illinois v. Gates, 103 S.Ct. 2317 (1983), properly

concluded that a warrant affidavit which recounted a sketchy, anonymous telephone tip, uncorroborated by police investigation, did not meet constitutional standards, where that "tip" was similar to the anonymous letter "tip" in Gates, which this Court also concluded would have been inadequate, if uncorroborated by police investigation.

STATEMENT OF THE CASE

The case of Commonwealth v. Upton was argued before the Supreme Judicial Court in January, 1983, in the light of the standards of Aguilar v. Texas, 378 U.S. 108 (1963) and Spinelli v. United States, 393 U.S. 410 (1969). After this Court's decision in Illinois v. Gates, 103 S.Ct. 2317 (1983), the Supreme Judicial Court issued an order on June 30, 1983, asking for supplemental briefs and further oral argument in the light of the Gates opinion.^{1/} After supplemental briefs,

^{1/} The Supreme Judicial Court's order read in
[continued]

including amici, and additional oral argument, the Supreme Judicial Court reversed the decision of the Barnstable Superior Court sustaining the search of the defendant's premises. App. A. Commonwealth v. Upton, 390 Mass. 562, 563 (1983).

STATEMENT OF THE FACTS

The affidavit in support of the search warrant at issue in this case is reproduced in the footnotes to the opinion of the Massachusetts Supreme Judicial Court. App. A, p. 3 - 5 . In brief, it recounted the

1-[continued from page -2-]/part:

"In light of the Gates opinion, the Court requests that the parties agree on a schedule for the prompt briefing, and subsequent oral argument before the Justices, of these issues: 1) the effect of the Gates opinion on this case and 2) what, if any, State law, including constitutional requirements, should be applied in determining the admissibility of the evidence seized pursuant to the search warrant."

App. A. p 13.

following:

On September 11, 1980, at approximately 12:00 p.m., Officer David Beland of the Yarmouth Police Department assisted in the execution of a search warrant for a room rented in the name of Ricky Kelleher in the Snug Harbor Motel in West Yarmouth, Massachusetts, during which various items, including credit cards in the names of Pendergast and O'Malley were seized.

At 3:20 p.m., Officer Beland received a phone call at the police station from an unidentified female stating there was "a motor home full of stolen stuff parked at number 5 Jefferson Avenue, the home of George Upton and his mother, last name unknown ..." The unidentified female stated that the "stolen stuff" consisted of "jewelry, gold, silver, a television set, and narcotics". She further stated that she had seen the items, that Upton had purchased them from Kelleher, and that Upton "was going to move the motor home

because he was aware of the fact that Ricky Kelleher's motel room had just been raided."

The woman refused to identify herself, stating that Mr. Upton would kill her. However, when the officer attributed a name to the caller, after recalling a brief introduction to a woman identified as Upton's girlfriend, Lynn Alberico, she stated that she was Lynn Alberico and was surprised the officer knew who she was. She further stated that she had broken up with George Upton and that she wanted to "burn him." Finally, she refused to give the officer a telephone number or address, but stated that she would contact him in the future if she needed to.

The affidavit offered corroboration of two facts in the caller's tip -- that there had been a search of a room at the Snug Harbor Motel and that a mobile home was parked on the defendant's premises. No other fact stated by the informant was corroborated by independent police work.

REASONS FOR DENYING THE WRIT

I. THE SEARCH IN THIS CASE WAS CONDUCTED UNDER A WARRANT WHICH WAS CLEARLY INVALID UNDER ILLINOIS V. GATES.

The Commonwealth calls for a review of the decision of the Supreme Judicial Court of Massachusetts on the grounds that the Supreme Judicial Court has "fundamentally misconstrued" this Court's decision in Illinois v. Gates, supra. The Commonwealth maintains that the Massachusetts court applied the Aguilar-Spinelli test for determining the validity of search warrant affidavits, which it describes as "now defunct" or "abandoned," and failed to apply the Gates "totality of the circumstances" approach. The Supreme Judicial Court, however, after having heard reargument and rebriefing in the light of Gates, hewed to both the letter and the spirit of that decision.

In Gates, this Court announced a "totality of the circumstances approach" which involved consideration of the same "highly relevant"

prongs as in Aguilar and Spinelli, but which underscored the fact that these factors were not "separate and independent" requirements to be applied according to a rigid formula, but were "closely intertwined" and "fluid", 103 S.Ct. at 2327.^{2/} However, even applying the "new" approach to the facts of Gates, the Court concluded that the anonymous letter reproduced in the search warrant affidavit was insufficient standing alone.^{3/} After consider-

^{2/} As an example, the Court noted that "a deficiency in one prong may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." 103 S.Ct. at 2328. The Commonwealth criticizes the Supreme Judicial Court for citing to the same example. See Cert. Pet., p. 10. In any case, the instant affidavit satisfied neither prong.

^{3/} The letter informed the police that "you have a couple in your town who strictly make their living on selling drugs." It then described the couple's unusual travel arrangements to and from Florida. It described the approximate date of the next "buy" and predicted that on that occasion the trunk would be loaded with over \$100,000 worth of drugs. The letter concluded by paraphrasing the Gates' comments on their work, and alleged that they are "friends with some big drug dealers, who visit their house often." 103 S.Ct. at 2325.

ing the letter in the light of the "highly relevant" factors outlined in Aguilar, supra, and Spinelli, supra, the Court noted:

The letter provides virtually nothing from which one might conclude that its author is either honest or his information reliable. Likewise, the letter gives absolutely no indication of the basis for the writer's predictions regarding the Gates' criminal activities.

103 S.Ct. at 2326.

What salvaged the Gates letter was independent police work which corroborated the travel arrangements of the Gates. The investigation confirmed information received from the informant about the future actions of third parties which were not easily predicted and thus were likely to have been obtained only from a person participating in or knowledgeable about illegal activity.

103 S.Ct. at 2335.

The Supreme Judicial Court, applying the very same "totality of the circumstances" approach, and considering the same "highly relevant" factors, concluded that the informant's telephone tip in the instant case, like the informant's letter in Gates was in-

adequate. The basis of the informant's knowledge was not "forcefully apparent" and "none of the common bases for determining the credibility of an informant or the reliability of her information is present here." Id. at 569.

Both tips involved unidentified informants.^{4/} There is no allegation that either provided reliable information in the past or was offering a statement against penal interest. Indeed, in Upton, the available information suggested that the informant had every motive to fabricate.^{5/}

Moreover, the substance of the telephone call was far less detailed than the substance of the letter in Gates. It did not provide

^{4/} The affiant could not identify the voice of the caller. He picked a name for this affiant, in effect, out of his hat. The telephone caller, not surprisingly, adopted the name selected. As the Supreme Judicial Court notes, in its original brief and again in oral argument the Commonwealth agreed that the informant was an unknown person. If Lieutenant Beland had known who the caller was, he would not have referred to the caller as an "unidentified female." App. p. 22.

^{5/} The caller volunteered that "she'd broken up with George Upton" and wanted to "burn him".

the type of internally detailed information that would assure the magistrate that he is "relying on something more substantial than a casual rumor circulating in the underworld, or an accusation based merely on an individual's general reputation." Spinelli, supra at 416. She did not tell the officers what items she saw, when she saw them, or how she knew they were stolen. The officers had no way of knowing whether the woman had lived in the motor home and was thus communicating personal observation, or whether she was merely passing on her hunches, or information disclosed from yet another unidentified informant.^{6/}

However, unlike Gates, independent police investigation did not corroborate any part of this informant's tip. All that the police

^{6/} In its "Question presented", the Commonwealth suggests that information concerning the search of Kelleher's hotel room was "not commonly known," a fact not in the record. Indeed, given the fact that this search occurred at noon, in a motel in a very small town, one can conclude precisely the opposite.

corroborated was the fact that there had been an earlier search and the fact that Upton had a mobile home on his premises. As a result the Court concluded:

If the affidavit in the case before us were to be upheld, the Fourth Amendment would be weakened to the level of permitting the search of any person's premises based on a telephone tip from an anonymous informer who told a story connecting those premises with the fact of a recent police search of a third person's room on the premises to which the public had access.

App. p. 30.

Thus, the Supreme Judicial Court's conclusion follows directly from Gates. However flexible, practical and commonsense the new approach is, the affidavit in the instant case fails to meet it.^{7/}

^{7/} It should also be noted that the defendant challenged the search on state constitutional and statutory grounds as well. The Court did not reach the state grounds noting:

"If we have misassessed the consequences of the Gates opinion and in fact the Gates standard proves to be unacceptably shapeless and permissive this court may have to define the protections guaranteed to the people against unreasonable searches and seizures by Art. 14, and the consequences of the violation of those protections."

App. A, p. 31-32.

II. THE DECISION OF THE COURT BELOW DOES NOT CONFLICT WITH THE DECISIONS OF OTHER STATE OR FEDERAL COURTS.

Under Gates the outcome of every case is "fact-specific." Rather than evaluating an affidavit according to a specific formula, Gates encourages magistrates and reviewing courts to review all of the "highly relevant" factors to determine what mixture is sufficient. While Gates provides a floor,^{8/} a bare minimum below which an affidavit may not fall, the combination of facts that will pass muster beyond that is left to the court's discretion.

Accordingly, other state and federal courts having before them affidavits which varied in terms of the details they provided, the character of the information, and the nature of police corroboration, have come to varied conclusions in the light of Gates. Rather

^{8/} The Court reaffirmed that an affidavit must not be so conclusory as was the affidavit in Nathanson v. United States, 290 U.S. 41, 54 (1933). The magistrate's decision cannot be a ratification of the "bare conclusions" of others as was the case in Aguilar v. Texas, supra. 103 S.Ct. at 2332.

than signifying a "conflict" in the circuits or between state courts, this result is perfectly consistent with the Gates approach.^{8/}

^{8/} Affidavits which have been sustained by courts and which are plainly distinguishable from the Upton affidavit:

Bonsness v. Wyoming, 672 P.2d 1291 (Wyo. 1983) (affidavit of an unidentified informant, providing information against penal interest and upon personal knowledge); Idaho v. Lang, 672 P. 2d 561 (Idaho 1983) and United States v. Mendoza, 722 F. 2d 96 (5th Cir. 1983) (affidavit in which the informant's tip was detailed and, as in Gates, in which important details were verified by police investigation); United States v. Ross, 713 F.2d 389 (8th Cir. 1983) (identified, ordinary citizen informant with no motive to fabricate); United States v. Johnson, 713 F.2d 654 (11th Cir. 1983) (source of information in affidavit was the victim of the crime); United States v. Haimowitz, 712 F.2d 457 (11th Cir. 1983) (affidavit made upon personal observation, with self-corroborating detail and also corroborated in important respects by another unassailable witness).

Affidavits which have been ruled invalid: United States v. Kolodziej, 712 F.2d 975 (5th Cir. 1983) (affidavit, like the instant one, which met neither the basis of knowledge nor the reliability prong, and which provided no police corroboration, failed even under the Gates standard).

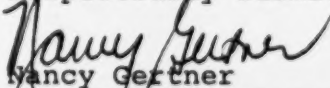
United States v. Herrera, 711 F.2d 1546 (1st Cir. 1983) cited by the Commonwealth, is not on point as it involves a customs search of a boat within United States customs waters based upon a "reasonable suspicion" standard.

There is no means of distinguishing these cases one from the other as a matter of law. While the Commonwealth suggests that there are doctrinal differences among the cases, the differences in the facts explain the differences in the outcomes. If this Court were to review each combination of facts to see if it agreed with the lower court's conclusions, it will be routinely substituting its analysis for that of the magistrates and lower courts. The Court's decision in Gates was intended to effect precisely the opposite result.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,



Nancy Gertner
SILVERGLATE, GERTNER, BAKER
& FINE

88 Broad Street
Boston, MA 02110
(617) 542-6663